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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	PR Docket No. 93-35
	)	
Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems At 929-930 MHz	)	RM-7986

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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TABLE OF CONTENTS

SUMMARY

Carl N. Davis d/b/a Afro-American Paging ("Davis") applied for a license to operate a six transmitter 900 MHz PCP system between Sacramento and Oakland. He positioned the transmitters so that under the rules proposed in the Commission's Notice of Proposed Rule Making ("NPRM") on channel exclusivity for 900 MHZ PCP systems, his local system qualified for channel exclusivity.

The Commission's Report and Order ("R&O") in that proceeding added a new subparagraph to the adopted rules concerning the requirements for qualifying for local channel exclusivity. The new subparagraph proposes a strict geographical requirement for transmitter spacing. Under the adopted rules, Davis' system, even though a "local" system by any logical definition, will not qualify for channel exclusivity.

The Commission failed to satisfy the requirements of the Administrative Procedure Act ("APA"), in adopting the additional subparagraph. It failed to give notice of its intent to adopt a requirement similar to the one contained in the new subparagraph. The added subparagraph was not a "logical outgrowth" of anything presented in the NPRM or the comments in the 900 MHz PCP channel exclusivity proceeding, and therefore, public notice of the substance of the added subparagraph was necessary. The procedure the Commission used to adopt the new rule subparagraph in the R&O also violated the Paperwork Reduction Act.

For all of these reasons, Davis seeks reconsideration of the Commission's decision to adopt that additional subparagraph.

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PETITION FOR PARTIAL RECONSIDERATION

Carl N. Davis d/b/a Afro-American Paging ("Davis"), by his counsel and pursuant to Section 1.429 of the Commission's Rules, hereby submits his Petition for Partial Reconsideration (the "Petition") of the Commission's Report and Order, FCC 93-479, released November 17, 1993 ("R&O"). [1/] In the R&O, the Commission amended its rules to provide channel exclusivity for 900 MHz private carrier paging ("PCP") systems that satisfied certain requirements.

I. Introduction

On March 31, 1993, the Commission released a Notice of Proposed Rule Making ("NPRM") in the above-referenced docket. The NPRM was premised upon a Petition for Rule Making filed by the National Association of Business and Educational Radio, Inc.

[1/] This Petition for Reconsideration is timely filed under Sections 1.4(b) and 1.429(d) of the Rules. Though released by the Commission on November 17, 1993, the text of the Report and Order upon which the Petition is based was not published in the Federal Register until November 26, 1993. The instant Petition is filed within 30 days of Federal Register publication.

("NABER"), and proposed several amendments to Part 90 of the Commission's Rules designed to enable licensees of private carrier paging systems to obtain channel exclusivity on local, regional and national levels. In the R&O, the FCC adopted final rules, including an unexplained departure from the NPRM which is arbitrary and capricious, and which, if not corrected, would render the Davis PCP system licensed under call sign WPDV 784 ineligible for grandfathered local exclusivity.

This Petition seeks reconsideration of the offending portion of the final rules.

II. The Proposed Rules and the Davis System

For a local PCP system to be eligible for channel exclusivity, the Commission proposed the following in the NPRM:

> "A local system must consist of at least six transmitters, except in New York, Los Angeles and Chicago MSA's where [ ] transmitters are required. No transmitter may be counted as part of a local system for purposes of this section unless:
>
> (i) it is located within 25 miles (40 kilometers) of at least one other transmitter in the system, and
>
> (ii) it is not co-located with any other transmitter being counted as part of a local system for purposes of this section."

(Emphasis added.) NPRM, Appendix A, page 21. The NPRM spoke only of the need for "contiguous transmitters" to be within a certain distance of either "another transmitter" or within a certain distance of "at least one other transmitter in the system." NPRM ¶¶ 19, 22.

Relying upon the NPRM, Davis filed an application to establish a PCP system serving the area between Sacramento and Oakland, California. Consistent with the NPRM, he proposed a system consisting of six transmitters, each transmitter being no more than 25 miles from one or more of the other transmitters. Under the proposed rules, the transmitters were "contiguous", and the six transmitters created a qualified local system eligible for channel exclusivity. Davis filed his applications before October 14, 1993, so for purposes this proceeding, he is considered an "incumbent licensee entitled to grandfathered status." R&O, p. 12, n. 64.[2/]

The six locations where Davis is licensed to construct transmitters in California are: Walnut Grove, Dixon, Vacaville, Concord, El Cerrito and Novato.[3/] He chose transmitter locations with existing towers, to allow him to provide service more quickly and inexpensively than if he had to construct new towers. The distances between the Davis transmitter locations are as follows:

Dixon to Walnut Grove	22 miles
Walnut Grove to Vacaville	24 miles
Vacaville to Concord	25.7 miles[4/]
Concord to El Cerrito	17 miles
El Cerrito to Novato	24 miles

2/ See FCC File No. 629032.

3/ See call sign WPDV784, issued to Davis by the Commission on December 3, 1993.

4/ Suison Bay, a large body of water, lies between the Vacaville and Concord sites. In the real world, 900 MHz radio waves propagate further over water than over land. Therefore, in the real world, the Vacaville and Concord reliable service area contours will overlap. There is no engineering or service-quality purpose served by building a new tower simply to keep the Vacaville and Concord locations within 25 miles of each other.

This arrangement satisfied the exclusivity prerequisites of the proposed rules; each transmitter is within 25 miles of at least one other transmitter. Moreover, the Davis PCP system satisfies the underlying intent behind the proposed rules, that the six transmitters be part of a local system. The proposed rules simply give Davis the flexibility to utilize existing towers, and to maximize coverage by taking into account propagation characteristics over water.

III. The Adopted Rules and Their Effect on the Davis System

The R&O adopted the local exclusivity rules as proposed in the NPRM with one glaring exception. Without discussion and although no comments were filed on the subject, the R&O added an additional subsection to § 90.495(a)(1) as finally adopted. Under the R&O's adopted rules, proposed § 90.495(a)(1)(ii) was renumbered as (a)(1)(iii) and a brand new subparagraph (a)(1)(ii) was added as follows:

> "(i) each transmitter is located within 25 miles (40 kilometers) of at least one other transmitter in the system;
>
> (ii) the combined areas defined by a 12.5 mile radius around each transmitter form a single contiguous area; and
>
> (iii) no transmitter is co-located with any other transmitter being counted as part of a local system for purposes of this section."

(Emphasis added.) Only local systems meeting this new subparagraph (a)(1)(ii) would qualify for channel exclusivity. Non-exclusive licensees are required to share their frequencies with other

qualified users (including future applicants), placing them at a tremendous competitive disadvantage.

This new subparagraph that the Commission added in the R&O changes the status of Davis' system. Under the proposed rules, his system qualified for channel exclusivity. Under the adopted rules, it does not. Even though the Vacaville and Concord sites are both less than 25 miles from at least one other transmitter, the extra 0.7 mile distance from the Vacaville site to the Concord site disqualifies the whole system from the benefits of channel exclusivity. Any proposal by Davis now, post-October 14, 1993, to modify his system to add a seventh site or to move the Concord site to meet the new § 90.495(a)(1)(ii) as adopted would be too little too late.[5/]

Davis constructed his system consistent with the letter and intent of the proposed rules. The added subsection which the Commission adopted in the R&O had no basis in the rule making process and cannot be considered a "logical outgrowth" of anything that was presented in the NPRM. Davis is being prejudiced by an improper action of the Commission and seeks reconsideration of the

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5/ If Davis attempts to add a transmitter site to satisfy the requirement of § 90.495(a)(1)(ii), the license for the added site will not be issued if a co-channel licensee has already qualified for channel exclusivity. R&O ¶ 31, n. 66. Unless Davis is able to qualify for channel exclusivity on the effective date of the R&O (see R&O ¶ 42), it is unlikely his system will ever be able to acquire such status. Especially in California, Davis has to be grandfathered as exclusive if he is ever to be exclusive at all.

Commission's unilateral decision to add subsection (ii) to the rule.

IV. The NPRM Did Not Provide Adequate Notice of the Rule As Adopted

The Administrative Procedure Act ("APA") provides that any agency's notice of proposed rule making shall contain "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Commission has codified that mandate. 47 C.F.R. § 1.413(c). The adequacy of the content of the notice is a critical starting point in determining the integrity of an administrative rule making proceeding.

The adequacy of the notice is determined by examining "whether the agency's notice would fairly appraise interested persons of the subjects and issues of the rule making." National Black Media Coalition v. F.C.C., 791 F.2d 1016 (CA2 1986). An agency must be free to adopt a final rule not described exactly in a notice of proposed rule making where the difference is "sufficiently minor." National Cable Television, Inc. v. F.C.C., 747 F.2d 1503 (US App DC 1984). However, the failure to present alternatives to the proposed rules or adopting additional rules not originally proposed that significantly change the impact of the rules taints the result of the administrative procedure. Spartan Radiocasting Co. v. F.C.C., 619 F.2d 314 (CA4 1980), citing, Rodway v. U.S. Department of Agriculture, 514 F2d 809, 814 (DC Cir 1975); American Iron & Steel Institute v. EPA, 568 F2d 284, 291 (CA3 1977).

The text of the new subparagraph § 90.495(a)(1)(ii) was not presented to the public until it appeared in the R&O. Neither the NPRM nor the R&O provided any rationale for such a rule, and of course, there has been no opportunity for comment from interested parties concerning whether such a rule is necessary, whether there are any alternatives to the rule that should be considered, or whether the rule would positively or adversely affect the PCP industry. Without prior release of the text, or at least an explanation of the problem the Commission attempted to address by adopting that new subparagraph, the notice requirement of the APA has not been met.

V. New Section 90.495(a)(1)(ii) Was Not a Logical Outgrowth of the Rules Proposed in the NPRM.

An agency is not required to present every alternative proposal in a notice of proposed rule making, however, if the adopted rule differs significantly from the proposed rule, courts have invalidated the rules. AFL-CIO v. Donovan, 757 F2d 330 (DC Cir. 1985). If the adopted rule is a "logical outgrowth" of the rules presented in the notice of proposed rule making, then the agency has satisfied its APA notice obligation. Id.

There was no discussion or solicitation of comments on a requirement that the combined areas defined by a 12.5 mile radius around each transmitter would have to form a single contiguous area. There was no mention of a need for any rule that would limit an applicant's ability to align transmitters to form a local system. Section 90.495(a)(1) as adopted differs too significantly

from the proposed rule in its consequences for paging licensees to be considered a "logical outgrowth" of the proposed rules.

Under the proposed rule, each transmitter in a system had to be located within 25 miles of another transmitter in order to be a "contiguous" transmitter. Six contiguous transmitters qualified as a "system" and on a local basis, the licensee would be entitled to a huge competitive benefit; channel exclusivity. The proposed rule relied on transmitters being located relatively close to one another (each within 25 miles of at least one other), while affording applicants some flexibility in locating sites to accommodate legitimate considerations such as utilizing existing towers and spacing sites to reflect real-world propagation characteristics. The proposed rule represented a reasoned balance between the need to make certain that local systems were truly local and the need to provide sufficient flexibility in system designs to meet real world concerns. So satisfactory was the proposed rule that no commenter sought to change it.

The adopted rules require the six sites to form a single contiguous area, using a radius of 12.5 miles from each transmitter even if the actual service area has a radius of more than 12.5 miles (e.g., where it passes over a body of water), and even if to do so creates adverse environmental or other impacts due to additional (and otherwise unnecessary) tower construction requirements.

The NPRM did not mention the possibility of such a tight geographical restriction. The NPRM did not propose any such

restriction. The purpose behind the 25-mile transmitter separation was discussed in the NPRM. NPRM ¶¶ 19, 22. The reasoning behind proposing six as the number of transmitters necessary for a local system is discussed. NPRM ¶¶ 19-21. If the added subparagraph is a key element of the rule, then the opportunity for public comment on the proposal or alternatives is only heightened. The difference between the "proposed" and the "adopted" rules in this case is more than "sufficiently minor". NCTA, supra.[6/]

In the instant proceeding, the reasoning behind the added subsection was never revealed. Nor were alternatives discussed. There was no foundation upon which to develop a "logical outgrowth." The rule was a unilateral action by the Commission with no basis in the NPRM, the comments or even in the R&O.

VI. The Goal of Section 90.495(a)(ii) Can Be Realized with a Less Stringent Rule.

Only the Commission knows why subparagraph 90.495(a)(1)(ii) was added, and in seeking reconsideration herein, Davis can only hazard a guess. Perhaps the Commission's intention was to keep

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6/ In NCTA, the Commission proposed a definition of "rural" using a community population of 1500 residents. The final rules used a figure of 2500 residents. NCTA appealed on the grounds the FCC had failed to give adequate notice of its intent to change the definition of "rural." The Court found that the "general reasoning" behind either definition was "clearly quite similar" and held that the Commission "fairly revealed the reasoning behind its proposed alternative finally adopted in slightly modified form." NCTA at p. ___. In other words, the change from a benchmark of 1500 residents to 2500 residents was a "logical outgrowth" of the proposed rules.

local systems confined to a smaller geographic area.[7/] Had Davis been given an opportunity, he would have explained that the Commission could prevent abuses while preserving necessary system design flexibility simply by extending the minimum radius slightly beyond the 12.5-mile standard. For example, a 15-mile radius provides flexibility while shutting off opportunities for abuse. Because each transmitter would still have to be within 25 miles of at least one other transmitter, no more than three "gaps" would be possible, and these "gaps" would be too small to allow anyone to claim exclusivity for a non-local system. They would, however, be enough to allow sincere applicants and licensees to accommodate other factors such as environmental concerns, tower locations and propagation irregularities without forfeiting exclusivity.

VII. Implementation of New § 90.495(a)(1)(ii) Without Prior OMB Approval (and Grandfathering of All Existing Systems Which Seek Modification Prior to OMB Approval) Violates the Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, 44 U.S.C. §§3501-3520 ("PRA"), federal agencies (including the FCC) are prohibited

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7/ Under the proposed rules, a licensee could qualify for channel exclusivity as a local system by locating three pairs of transmitters 100 miles from each other, but keeping the two transmitters in each pair within 25 miles of each other. Though an impractical scenario, it was nonetheless a possibility. New subparagraph § 90.495(a)(1)(ii) prevents that scenario, but is too restrictive on PCP licensees. The same goal can be accomplished with a slightly more lenient requirement (e.g., a 13 or 15 mile radius as the measuring criterion). A simple half-mile increase in the present 12.5-mile radius requirement would allow Davis' system to qualify for channel exclusivity while allowing Davis to maintain his current, real-world system design.

from imposing new substantive information collection requirements without prior approval of the Office of Management and Budget ("OMB"). See, e.g., Kent S. Foster, 7 FCC Rcd. 7971 (1992); Asset Management Corp., 6 FCC Rcd. 6538 (MSD, 1991). Grandfathered PCP channel exclusivity is not automatically conferred upon eligible licensees; rather, it is the subject of a new type of FCC application pursuant to new § 90.495(e). See R&O at ¶ 42. That new application form includes a requirement that the applicant supply information respecting compliance with new § 90.495(a)(1)(ii). Id. Accordingly, at least as applied to incumbent licensees such as Davis, new § 90.495(a)(1)(ii) is an "information collection requirement."[8/]

Therefore, under the PRA, new § 90.495(a)(1)(ii) cannot be imposed to deny grandfathered local exclusivity to those incumbent licensees, such as Davis, who met the OMB-approved proposed rule but not the new (and not yet OMB-approved) final rule. See Foster, supra, 7 FCC Rcd. at 7972; Asset Management, supra, 6 FCC Rcd. at 6539. Stated simply, the Commission cannot retroactively remove exclusivity eligibility from incumbent licensees who met the eligibility requirements of the OMB-approved NPRM proposed rules, without first going back to get further OMB approval and without first giving that class of incumbent licensees an opportunity to modify their licenses to meet the new rule and be deemed

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8/ So are as Davis can tell, the Commission provided OMB with, and obtained OMB approval for, the proposed rules set forth in the NPRM, but not the final rules contained in the R&O.

grandfathered exclusive as if the modification were filed pre-October 14, 1993.

VIII. Conclusion

The Commission failed to provide adequate notice of its intent to adopt a rule similar to § 90.495(a)(1)(ii). That particular subparagraph cannot be considered a "logical outgrowth" of any of the rules that Commission proposed in the NPRM. As adopted, the rules is too restrictive on a licensee's system design flexibility, and penalizes legitimate PCP licensees who deserve grandfathered exclusivity for what are patently local systems. In any event, as applied to incumbent licensees such as Davis, imposition of new § 90.495(a)(1)(ii) to remove eligibility for status as a grandfathered exclusive licensee is a violation of the PRA.

The Commission should reconsider its adoption of § 90.495(a)(1)(ii), and either: (1) issue a further notice of proposed rule making to allow for public comment as to whether that rule will serve its intended purpose and to allow exploration of any alternatives that might better serve the public interest convenience and necessity; (2) increase the 12.5-mile amount to a more reasonable figure such as 15 miles, thereby implementing a less restrictive alternative which satisfies the policies underlying the rule; or (3) afford adversely-affected incumbent licensees such as Davis the opportunity to modify their licenses

to meet the new rule and treat those modifications as pre-October 14, 1992 applications for the purposes of grandfathered exclusivity.

Respectfully submitted,

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